

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 7th day of August, two thousand and six.

PRESENT:

HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
HON. PETER W. HALL,
Circuit Judges.

Ruoer Huang, Ai Fen Hu, Xing Hua Huang, Jinhu Huang,

Petitioner,

v.

Nos. 03-40558-ag (L);
03-40559-ag (Con);
03-40560-ag (Con);
03-40561-ag (Con)
NAC

Bureau of Citizenship and Immigration Services,

Respondent.

1 FOR PETITIONER: Theodore N. Cox, New York, New York.

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3 FOR RESPONDENT: John L. Brownlee, United States Attorney for the Western District
4 of Virginia, Julie C. Dudley, Assistant United States Attorney,
5 Roanoke, Virginia.
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7 UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
8 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED, that the
9 petition for review is DENIED.

10 Xing Hua Huang and Ai Fen Hu, and their children Ruor Huang, and Jinhu Huang
11 (“Huangs”), through counsel, petition for review of the BIA’s denial of their motion to reopen
12 their removal proceedings. We assume the parties’ familiarity with the underlying facts and
13 procedural history of the case, and note that only the denial of the motion to reopen is under
14 review because that is the only decision from which the Huangs filed a timely petition for review.
15 *See Kaur v. BIA*, 413 F.3d 232,233 (2d Cir. 2005) (*per curiam*).

16 This Court reviews the BIA’s denial of a motion to reopen or reconsider for abuse of
17 discretion. *See Kaur*, 413 F.3d at 233; *Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir.
18 2006). An abuse of discretion may be found where the BIA’s decision “provides no rational
19 explanation, inexplicably departs from established policies, is devoid of any reasoning, or
20 contains only summary or conclusory statements; that is to say, where the Board has acted in an
21 arbitrary or capricious manner.” *Kaur*, 413 F.3d at 233-34; *Ke Zhen Zhao v. U.S. Dep’t of*
22 *Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted).

23 Here, the BIA did not abuse its discretion in denying the Huangs’s motion. Because the
24 medical reports evidence a sterilization that allegedly took place in 1983, the BIA reasonably
25 concluded that the results of the medical exam could have been submitted to the IJ at the hearing.

1 Further, it is clear that the articles about the flood could have been submitted at that time. The
2 BIA had a reasonable basis for concluding that there is no showing that the new evidence was
3 not previously available or discoverable. *See* 8 C.F.R. § 1003.2(c)(1) (2006).

4 Moreover, the BIA did not abuse its discretion in concluding that the evidence was
5 insufficient to establish *prima facie* eligibility. The Huangs claim that the BIA improperly
6 applied the IJ's old adverse credibility determination to new evidence, however, the BIA did not
7 abuse its discretion because the Huangs's claim of a well-founded fear of persecution is the same
8 claim that the IJ denied and it is based entirely on the same factual predicate that the IJ found not
9 to be credible. *Cf. Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006).

10 Furthermore, the BIA did not abuse its discretion or apply an incorrect standard of law by
11 stating that the "evidence is inadequate to establish that the adult female respondent underwent
12 an involuntary sterilization." Although the Huangs are correct in stating that they are only
13 required to show *prima facie* eligibility, they are mistaken in their assertion that the BIA applied
14 a different standard. Read in the context of the Huangs's case and the BIA's decision, it is clear
15 that the BIA found that the evidence, *even if it was true*, failed to establish Ai Fen had a
16 sterilization that was *involuntary*. . Therefore, the BIA did not abuse its discretion.

17 Finally, this court lacks jurisdiction to review the BIA's discretionary decision not to
18 invoke its *sua sponte* authority. *Ali v. Gonzales*, 448 F3. 515, 517-18 (2d Cir. 2006).

19 For the foregoing reasons, the petition for review is DENIED. Having completed our
20 review, any stay of removal that the Court previously granted in this petition is VACATED, and
21 any pending motion for a stay of removal in this petition is DENIED as moot. Any pending
22 request for oral argument in this petition is DENIED in accordance with Federal Rule of

1 Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

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FOR THE COURT:

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Roseann B. MacKechnie, Clerk

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By:_____